

FILED

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**Board of Vocational Nursing
and Psychiatric Technicians**

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9 **BEFORE THE**
BOARD OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. VN-2011-919

13 **MARTIN HARRY KOLER**
40351 177th Street, S E
14 Palmdale, CA 93591

A C C U S A T I O N

15 **Vocational Nurse License No. VN 211184**

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

20 1. Teresa Bello-Jones, J.D., M.S.N., R.N. (Complainant) brings this Accusation solely in
21 her official capacity as the Executive Officer of the Board of Vocational Nursing and Psychiatric
22 Technicians, Department of Consumer Affairs.

23 2. On or about September 23, 2004, the Board of Vocational Nursing and Psychiatric
24 Technicians issued Vocational Nurse License Number VN 211184 to Martin Harry Koler
25 (Respondent). The Vocational Nurse License was in full force and effect at all times relevant to
26 the charges brought herein and will expire on December 31, 2013, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Vocational Nursing and Psychiatric Technicians (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 2875 of the Code provides, in pertinent part, that the Board may discipline the holder of a vocational nurse license for any reason provided in Article 3 of the Vocational Nursing Practice Act.

5. Section 118, subdivision (b) of the Code provides, in pertinent part, that the expiration of a license shall not deprive the Board jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated. Under section 2892.1 of the Code, the Board may renew an expired license at any time within four years after the expiration.

STATUTORY PROVISIONS

6. Section 482 of the Code states:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

(a) Considering the denial of a license by the board under Section 480; or

(b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

7. Section 490 of the Code provides, in pertinent part, that the Board may suspend or revoke a license when it finds that the licensee has been convicted of a crime substantially related to the qualifications, functions or duties of a licensed vocational nurse.

8. Section 493 of the Code states:

Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board

1 may inquire into the circumstances surrounding the commission of the crime in order
2 to fix the degree of discipline or to determine if the conviction is substantially related
to the qualifications, functions, and duties of the licensee in question.

3 As used in this section, "license" includes "certificate," "permit," "authority,"
4 and "registration."

5 9. Section 2878 of the Code states:

6 The Board may suspend or revoke a license issued under this chapter [the
7 Vocational Nursing Practice Act [Bus. & Prof. Code, 2840, et seq.] for any of the
following:

8 (a) Unprofessional conduct, which includes, but is not limited to, the
9 following:

10

11 (f) Conviction of a crime substantially related to the qualifications, functions,
12 and duties of a licensed vocational nurse, in which event the record of the conviction
shall be conclusive evidence of the conviction.

13

14 10. Section 2878.5 of the Code states:

15 In addition to other acts constituting unprofessional conduct within the meaning
16 of this chapter [the Vocational Nursing Practice Act] it is unprofessional conduct for
a person licensed under this chapter to do any of the following:

17

18 (b) Use any controlled substance as defined in Division 10 of the Health and
19 Safety Code, or any dangerous drug as defined in Section 4022, or alcoholic
20 beverages, to an extent or in a manner dangerous or injurious to himself or herself,
any other person, or the public, or to the extent that the use impairs his or her ability
to conduct with safety to the public the practice authorized by his or her license.

21 (c) Be convicted of a criminal offense involving possession of any narcotic or
22 dangerous drug, or the prescription, consumption, or self-administration of any of the
23 substances described in subdivisions (a) and (b) of this section, in which event the
record of the conviction is conclusive evidence thereof.

24

25 11. Section 2878.6 of the Code states:

26 A plea or verdict of guilty or a conviction following a plea of nolo contendere
27 made to a charge substantially related to the qualifications, functions and duties of a
28 licensed vocational nurse is deemed to be a conviction within the meaning of this
article. The board may order the license suspended or revoked, or may decline to
issue a license, when the time for appeal has elapsed, or the judgment of conviction

1 has been affirmed on appeal or when an order granting probation is made suspending
2 the imposition of sentence, irrespective of a subsequent order under the provisions of
3 Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty
and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing
the accusation, information or indictment.

4 **REGULATORY PROVISIONS**

5 12. California Code of Regulations, title 16, section 2518.6, provides, in pertinent part,
6 that a licensed vocational nurse shall adhere to standards of the profession, and shall incorporate
7 ethical and behavioral standards of professional practice by abstaining from chemical/substance
8 abuse. A violation of this section constitutes unprofessional conduct for purposes of initiating
9 disciplinary action.

10 13. California Code of Regulations, title 16, section 2521, states:

11 For the purposes of denial, suspension, or revocation of a license pursuant to
12 Division 1.5 (commencing with Section 475) of the Business and Professions Code, a
13 crime or act shall be considered to be substantially related to the qualifications,
14 functions or duties of a licensed vocational nurse if to a substantial degree it
15 evidences present or potential unfitness of a licensed vocational nurse to perform the
functions authorized by his license in a manner consistent with the public health,
safety, or welfare. Such crimes or acts shall include but not be limited to those
involving the following:

16 (a) Procuring a license by fraud, misrepresentation, or mistake.

17 (b) A conviction of practicing medicine without a license in violation of
Chapter 5 of Division 2 of the Business and Professions Code.

18 (c) Violating or attempting to violate, directly or indirectly, or assisting in or
19 abetting the violation of, or conspiring to violate any provision or term of Chapter
6.5, Division 2 of the Business and Professions Code.

20 (d) Aiding or assisting, or agreeing to aid or assist any person or persons,
21 whether a licensed physician or not, in the performance of or arranging for a violation
of any of the provisions of Article 13, Chapter 5, Division 2 of the Business and
22 Professions Code.

23 (e) Conviction of a crime involving fiscal dishonesty.

24 (f) Any crime or act involving the sale, gift, administration, or furnishing of
25 "narcotics or dangerous drugs or dangerous devices" as defined in Section 4022 of the
Business and Professions Code.

26 14. California Code of Regulations, title 16, section 2522 states:

27 When considering a) the denial of a license under Section 480 of the Business
28 and Professions Code, b) the suspension or revocation of a license on the ground that
a licensee has been convicted of a crime, or c) a petition for reinstatement of a license

1 under Section 2787.7 of the Business and Professions Code, the Board in evaluating
2 the rehabilitation of an individual and his or her present eligibility for a license, will
consider the following criteria:

- 3 (1) Nature and severity of the act(s), offense(s), or crime(s) under consideration.
- 4 (2) Actual or potential harm to the public.
- 5 (3) Actual or potential harm to any patient.
- 6 (4) Overall disciplinary record.
- 7 (5) Overall criminal actions taken by any federal, state or local agency or court.
- 8 (6) Prior warnings on record or prior remediation.
- 9 (7) Number and/or variety of current violations.
- 10 (8) Mitigation evidence.
- 11 (9) In case of a criminal conviction, compliance with terms of sentence and/or
12 court-ordered probation.
- 13 (10) Time passed since the act(s) or offense(s) occurred.

14 **COSTS**

15 15. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
16 administrative law judge to direct a licentiate found to have committed a violation or violations of
17 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
18 enforcement of the case, with failure of the licentiate to comply subjecting the license to not being
19 renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be
20 included in a stipulated settlement.

21 **FIRST CAUSE FOR DISCIPLINE**

22 **(January 6, 2012 Criminal Conviction for DUI on August 16, 2011)**

23 16. Respondent has subjected his license to disciplinary action under sections 490 and
24 2878, subdivision (f) of the Code in that he was convicted of a crime that is substantially related
25 to the qualifications, functions, and duties of a licensed vocational nurse. The circumstances are
26 as follows:

27 a. On or about January 6, 2012, in a criminal proceeding entitled *People of*
28 *the State of California v. Martin Harry Koler, aka Martin H. Koler*, in Orange County Superior

1 Court, case number 11HM15689, Respondent was convicted on his plea of guilty of violating
2 Vehicle Code section 23152, subdivision (b), driving with a blood alcohol concentration (BAC)
3 of .08 percent or more, a misdemeanor. The court found true the special allegation that
4 Respondent's BAC was .20 percent or more, within the meaning of Vehicle Code section 23538,
5 subdivision (b)(2). The court dismissed an additional count of violating Vehicle Code section
6 23152, subdivision (a), driving under the influence of alcohol, pursuant to a plea agreement.

7 b. As a result of the conviction, on or about January 6, 2012, Respondent was
8 ordered to serve two days in the Orange County Jail, with credit for two days, and granted three
9 years informal probation. Respondent was given the option of completing 49 hours of
10 community service in lieu of a fine. Respondent was further ordered to complete a nine-month
11 Level 2 First Offender Alcohol Program, pay additional fees, fines and restitution, and comply
12 with the terms of DUI probation.

13 c. The facts that led to the conviction are that just before midnight, on or
14 about August 16, 2011, two officers with the California Highway Patrol (CHP) were patrolling
15 Interstate 5 in San Diego County when they observed a truck, driven by Respondent, making
16 multiple dangerous maneuvers, including weaving in his lane, nearly sideswiping two big rig
17 trucks, drifting onto the shoulder, straddling the lane lines, all while exceeding the posted speed
18 limit. Upon contact with Respondent, the officers observed an open can of beer on the passenger
19 seat. There was an obvious odor of an alcoholic beverage emitting from the truck, Respondent's
20 eyes were red and watery, his speech was slurred and thick. Respondent admitted that he had
21 been drinking beer in his vehicle. Respondent was directed to exit his truck. His gait was
22 unsteady, and he swayed and stumbled when he walked to the front of the patrol vehicle.
23 Respondent submitted to a series of field sobriety tests which he was unable to complete as
24 explained and demonstrated by the officer. Respondent attempted to provide three breath
25 samples for the preliminary alcohol screening test, but the device aborted the test. Respondent
26 was arrested for driving under the influence. During booking at the Orange County Jail,
27 Respondent provided a blood sample which was analyzed with a BAC of .20 percent.

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1 **SECOND CAUSE FOR DISCIPLINE**

2 **(Dangerous Use of Alcohol)**

3 17. Respondent has subjected his license to disciplinary action under section 2878.5,
4 subdivision (b) of the Code for unprofessional conduct in that on or about August 16, 2011, he
5 used alcohol in manner that was dangerous and potentially injurious to himself and to the public,
6 when he drove a motor vehicle while significantly impaired by alcohol, as described in paragraph
7 16, above.

8 **THIRD CAUSE FOR DISCIPLINE**

9 **(Alcohol-Related Criminal Conviction)**

10 18. Respondent has subjected his license to disciplinary action under section 2878.5
11 subdivision (c) of the Code for unprofessional conduct in that on or about January 6, 2012,
12 Respondent was convicted of an alcohol-related criminal offense, as described in paragraph 16,
13 above.

14 **FOURTH CAUSE FOR DISCIPLINE**

15 **(Failure to Abstain From Substance Abuse)**

16 19. Respondent has subjected his license to disciplinary action under section 2878,
17 subdivision (a) of the Code, and California Code of Regulations, title 16, section 2518.6 in that
18 Respondent has failed to abstain from substance abuse, as described in paragraph 16, above.

19 **DISCIPLINARY CONSIDERATIONS**

20 20. To determine the degree of discipline, if any, to be imposed on Respondent, pursuant
21 to California Code of Regulations, title 16, section 2522, Complainant alleges that on or about
22 March 10, 2004, in a prior disciplinary matter entitled *In the Matter of the Statement of Issues*
23 *Against Martin Harry Koler*, case number 6624, the Board filed a Statement of Issues alleging
24 Respondent subjected his application for a vocational nurse license to denial based on the
25 following:

26 21. Applicant/Respondent's application was subject to denial based on section 480,
27 subdivision (a)(1) of the Code in that he was convicted of the following crimes that are
28 substantially related to the qualifications, functions, and duties of a licensed vocational nurse:

1 a. On or about November 1, 2000, Respondent was convicted by the court on a
2 guilty plea of one count of violating Health and Safety Code section 11357, subdivision (b)
3 (possession of less than 1 oz. of marijuana - a misdemeanor) and one count of violating Penal
4 Code section 853.7 (failure to appear on written promise – a misdemeanor) in the Superior Court
5 of California, County of Riverside, case number PEM023568, entitled *People v. Martin Harry*
6 *Koler*. The circumstances surrounding the conviction are that on or about January 21, 2000,
7 Applicant/Respondent did willfully and unlawfully possess less than one ounce of marijuana.

8 b. On or about May 26, 2000, Respondent was convicted by the court on a nolo
9 contendere plea of one count of violating Vehicle Code section 23153, subdivision (a) (driving
10 under the influence causing bodily injury – a felony) in the Superior Court of California, County
11 of San Bernardino, case number FWV019751 entitled *People v. Martin Harry Koler*. The
12 circumstances surrounding the conviction are that on or about March 1, 2000, Applicant/
13 Respondent did unlawfully, while under the influence of an alcoholic beverage and a drug and
14 under their combined influence, drive a vehicle and in so driving, concurrently did an act
15 forbidden by law and neglected a duty imposed by law which proximately caused great bodily
16 injury to another.

17 c. On or about March 24, 1998, Respondent was convicted by the court on a nolo
18 contendere plea of one count of violating Vehicle Code section 23153, subdivision (b) (driving
19 while having 0.08% and more, by weight, of alcohol in his blood and causing bodily injury – a
20 misdemeanor) in the State of California, Los Angeles Municipal Court of Southeast South Gate
21 Judicial District, case number 7SG04492 entitled *People v. Martin Harry Koler*. The
22 circumstances surrounding the conviction are that on or about June 27, 1997,
23 Applicant/Respondent did unlawfully drove a vehicle while having 0.08% and more, by weight,
24 of alcohol in his blood which caused bodily injury to another.

25 22. Applicant/Respondent's application was subject to denial under section 480,
26 subdivision (a)(2) of the Code, based on the facts as stated above, he committed acts of
27 dishonesty, fraud or deceit with the intent to substantially benefit himself or another.

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23. As a result of the Statement of Issues, the Board entered into a stipulated settlement with Respondent, effective September 10, 2004. As part of the stipulation, Respondent admitted each and every charge and allegation in the Statement of Issues. Respondent's application for licensure was granted. Upon issuance of the license, it was immediately revoked, the revocation was stayed, and Respondent was placed on probation for a period of five (5) years on certain terms and conditions. Respondent successfully completed his probation on September 22, 2009.

PRAAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Vocational Nursing and Psychiatric Technicians issue a decision:


1. Revoking or suspending Vocational Nurse License Number VN 211184, issued to Martin Harry Koler;

2. Ordering Martin Harry Koler to pay the Board of Vocational Nursing and Psychiatric Technicians the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

3. Taking such other and further action as deemed necessary and proper.

DATED:

MAY 13 2013


TERESA BELLO-JONES, J.D., M.S.N., R.N.
Executive Director

TERESA BELLO-JONES, J.D., M.S.N., R.N.
Executive Officer
Board of Vocational Nursing and Psychiatric Technicians
Department of Consumer Affairs
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Complainant

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